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ABETMENT OF TORTS.

There is a very suprising paucity of authority on the question whether an abetment of a tort is itself an actionable wrong. There is hardly any case in which it is at all discussed in detail. Perhaps having regard to the variety of actionable wrongs, it may not be possible to lay down an invariable rule as to whether abetment of a tort is itself a tort. Sir F. Pollock, in his Draft Civil Wrongs Bill for India does not seem to treat abetment of a wrong as a wrong, except where there is the relationship of master and servant, or principal and agent, either in general or with reference to the particular act, between the wrong doer and the person abetting (see sections 13, 14, 15). In section 15, no doubt, he provides in clause 2 that "persons who agree to commit a wrong which is in fact committed in pursuance of that agreement are joint wrong-doers, even if the wrongful act is committed by, or under the immediate authority of some or only one of those persons". The latter portion of the clause would seem to suggest that abetment is sufficient to constitute the abettor a wrong-doer. We doubt, however, whether the learned author meant to go so far; and the authority he quotes, namely, *Ganesh Sing* v. *Ram Raja* 3. B. L. R., 44 certainly does not lay down such a broad proposition. The real point decided in that case by the Judicial Committee was that every one who takes part in a joint wrong is responsible for the whole wrong and that the law will not apportion the tort or the punishment for it amongst those who take part in it. But it is clear that their Lordships meant to apply the rule only to one who actually took part in the commission of the tort, and not to one who merely abetted it, say by instigating it, or by helping in it without being present. Their Lordships say "you have nothing to do,

but simply to see that in point of fact the parties accused were part of that common assembly which had, and *executed,* a common purpose of plundering this man's house, and which bound each and all to make compensation for the loss he has sustained by the demolition and abstraction of his property". Actual presence at the scene of the wrong may not be necessary to make a person a tort-feasor, for a number of individuals who plot a wrong may use some among the number as the actual perpetrators of the wrong. In such cases, the latter would be properly regarded as the agents of all, but unless the relationship of agent and principal could be said to exist, it would be hardly right to say that a person who takes part in a conspiracy *executes* the wrong. If Sir F. Pollock intended to lay down that an abettor always becomes a joint wrong-doer with reference to the wrong abetted by him whether the relationship of principal and agent exists or not, we have no doubt that he would have done so in much clearer language than he has used in S. 15 of the Bill. We are strengthened in this opinion by the fact that the author does not enunciate such a broad rule in his text book. He merely lays down that when a person commands another to do a wrongful act, whether the latter be his agent or servant, and whether he employs him either generally or only to do the particular act, he is responsible for the wrong; because, in substance, it is he that commits the wrong, though he does so with the hand of another. He says, (p. 69. Torts) "it scarce needs authority to show that a man is liable for wrongful acts which have been done according to his express command or request, or which having been done on his account or for his benefit, he has adopted as his own."

Where a person employs an agent or a servant to commit a tort, we think the act which he does is really one of instigation only, and that in strict legal language he is only an abettor. He cannot be said to do the act himself, not taking any part in the actual doing of it. These are cases, therefore, where the abettor is responsible. We may also add that where a person employs a contractor—an independent contractor—to do a wrongful act or an act which cannot be done without the commission of a tort, it has been established beyond a doubt that he is liable for the tort of the contractor. In *Ellis* v. *Sheffield Gas Consumers' Company*, 2 El.& Bl. 767, the Court observed, "it would be monstrous if the party causing another

to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." In discussing, therefore, the question which is the subject of the present article, we may at once put on one side those cases, where a person expressly employs another to do an act, and that other is his agent or servant or subordinate, subject to his control. The question is where such is not the case, where a person instigates another independent person to do a wrongful act, or helps him for the purpose without himself taking a part in doing the act, is he guilty of a tort?

Let us first briefly glance at the authorities on the question. Addison in his work on Torts seems to lay down in very general language that every instigation of a wrong is itself a wrong. He says, (p. 96. Torts) "For, every one who procures the violation of a right to be done by another is as responsible as if he did the act himself. Thus in violation of a right to property, whether real or personal, or to personal security, he who procures the wrong to be done is a joint wrong-doer, and may be sued, either alone or jointly with the agent, for the wrong done. So if one person incites another to commit forgery or perjury or nuisance, or to bring a false charge or accusation and the accused party is acquitted of the charge, the instigator of the wrongful act is responsible for its injurious consequences. Thus where the mistress of a wine shop brought an action against the defendant for procuring a soldier and others to come with a man dressed in woman's clothes, and there conduct themselves with indecency, and collect a crowd, and raise a cry of "bawdy house", by reason whereof the mob threw stones, and broke the plaintiff's windows, and damaged and destroyed her furniture, it was held that the defendant was responsible for all the damage sustained by the plaintiff, although he did not himself appear on the scene, or join in the cry, *Plunkét* v. *Gilmore* Fortescue 211." Apparently this case, seems to support the view that an abetment is a wrong.

But two other cases referred to by Addison, namely, *Coxe* v. *Smith* I. Lev. 119, and *Fitzjohn* v. *Mackinder* 9 C. B. N. S. 565, seem to us to rest on a different footing. Both of them were cases where the defendant set the Officers of Justice in motion against the plaintiffs, and it was found that the proceedings taken against the plaintiff were unjustifiable in the circumstances. It will be

observed that the acts of the Officers of Justice were not in themselves tortious, because they were justified in proceeding against the plaintiffs by the information placed before them. They were not, therefore, cases of abetment of a tort, but cases where the procuring of an act, rightful in itself, is tortious, because for reasons of public policy the person doing the act is himself protected. We have also a similar case where the instigation of an act, not wrongful in itself, may be wrongful. Thus maliciously inducing another not to enter into a contract with a person is wrongful, though the person instigated does no wrong in abstaining from entering into the contract, for no one is bound to enter into contracts with others (see *Flood* v. *Jackson* C. A. (1895) 2 Q. B. 21. Sir F. Pollock classes this under miscellaneous wrongs which may be described as malicious interference with rights (see page 578, note to S. 43). These are not really cases of *abetment* of torts. In another case *Upton* v. *Greenlies,* the Court observed "it is not necessary that the relation of principal and agent, in the sense of one commanding and the other obeying, should exist in order to make one responsible for the tortious act of another. It is enough if it be shown to have been by his procurement and with his assent. The cases where the liability of one for the wrongful act of another has turned upon the relation of principal and agent are quite consistent with the party's liability irrespective of any such relation; as:—if I agree with a builder to build me a house according to a certain plan, he would be an independent contractor, and I should not be liable to strangers for any wrongful act unnecessarily done by him in the performance of his work; but clearly I would be jointly liable with him for a trespass on the land, if it turned out that I had no right to build upon it." Notwithstanding the generality of the language, the case was only one of the employment of a contractor. On the other hand in *Barker* v. *Braham,* 2 W. Bl. 866 it is observed "now there being no accessories in trespass, Co. Litt. 57, the attorney must either be guilty as a principal or not at all; and it is held that a trespasser may be not only he who does the act, but who commands it, or procures it to be done, or who assents afterwards." It is difficult to agree with the above reasoning; because there are no accessories, therefore we are told that accessories are liable as principals. But perhaps the latter portion of the sentence is confined to cases of an actual command to an agent or

servant. In Coke on Littleton 180. B, we find the following. "If A, disseise one to the use of B, who knoweth not of it, and B, assent to it, in this case till the agreement A was tenant of the land, and after the agreement B is tenant of the land, but both of them be disseisors for *omnis ratihabitio retrotrahitur et mandato equiparatur*, and it is worthie of the observation, and implied also in the latter &c., that seeing co-adjutors, counsellors, commanders &c. are all disseisors; that albeit the disseisor which is tenant dieth, yet the assise lieth against the coadjutor, commander, &c., and the tenant of the land though he be no disseisor." Several cases from the year—books are quoted in support of the statement, the latter part of which would seem to show that a mere counsellor may be answerable for the tort to which the counsel relates. In *Flood* v. *Jackson* C. A. (1895) 2 Q. B. 21, one of the Lords Justices observed "Is there any principle of law upon which, if a person be injured by the malicious inducement of a refusal to employ him, that person's right to a remedy in damages against the malicious intruder can be held to depend upon the injury being accompanied or inflicted through a breach of contract between him and the party so induced? I cannot think that there is any such principle."

In *Lumley* v. *Gye*, 2 El. & Bl., 216, *Crompton J.* observed:—"Suppose a trader with a malicious intent to ruin a rival trader goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices him, I am, by no means, prepared to say that an action could not be maintained against him." The language of Erle, J. is still wider. "The class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when the principle is applied to a violation of a right arising upon a contract of hiring; the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of the right is a cause of action in all instances, whether the violation is an actionable wrong as in the violation of a right to property whether real or personal, or to personal security. He who procures the wrong is a joint wrong-doer, and may be sued either alone or jointly with the agent in the appropriate action for the wrong complained of." But these observations were not necessary for the decision of the case. In *Kasheenath Koer* v. *Debi Kristo Ramanooj Doss*, 16 W. R, 240; *Paul*, J. observes "In actions of

wrong not only those who commit the wrong are liable, but those who abetted the tortious acts are equally liable. So even if we accepted the story related by Kasheenath, he would be a joint tort-feasor with Modhoo Thawkore." The abetment in the particular case was by the payment of money to help the commission of the tortious act." We have thus in the decided cases general observations and *obiter dicta* of eminent judges tending to show that an abetment of a wrong is wrongful. But there have been, however, few cases actually deciding the question.

Let us now examine the matter for a while on principle. The Law of Torts is a part of the law of obligations or rights against particular persons like the Law of Contracts. But there is one important difference between Contracts and Torts. In a contract there is an antecedent right *against a particular person* arising out of an agreement between two parties, and the wrong consists in the violation of that right; while torts, on the other hand, excepting those relating to negligence and some other instances, are violations of rights *in rem*. It is very doubtful whether, in contracts, a promisee can claim a right of action not only against the promisor who violates his right, but also against a person who instigates him to do so. The promisee never looked except to the promisor for the satisfaction of his right, and to give him a cause of action against an abettor of the breach of his contract would in substance be to convert a right *in personam* into a right *in rem*; for it would amount to saying that the promisee has not only a right against the promisor that he should fulfill his promise, but also a right against all the world that they should abstain from the violation of his right to have the promise fulfilled by the promisor. Sir F. Pollock apparently does not approve of this extension of the rights of a promisee (see p. 578. Torts). It has no doubt been held in England in a series of cases that instigating a party to a contract to break it is an actionable wrong, provided the instigation was the result of actual malice. With the greatest respect for the eminent judges who have so decided, we must confess to some misgivings both as to the soundness and expediency of such an extension of rights *ex-contractu*. But the abetment of a tort in many cases seems to us to be a very different kind of thing. It is as already observed, the violation of a right *in rem*. The actions which constitute torts are in many cases also crimes, and in a criminal

court an abettor of the act is punishable. Why should not the abettor be also civilly liable? In the case of torts affecting the person, or reputation, or personal relations in the family, or estate generally, the wrong is generally speaking wilful or wanton in that the act is intended to do harm, or being one evidently likely to cause harm, it is done with reckless indifference to what may befall by reason of it. Either there is deliberate injury, or there is something like self-seeking indulgence or contempt of other men's rights. Is there any reason then for holding that the abettors of such acts should not be liable for the acts which they abet? To our mind there is no such reason. There is, no doubt, one difference between the law of abetment in civil and criminal law. In the latter, abetment is punishable, even though the act abetted is not actually committed. But in the former the abettor cannot be held to be guilty of a wrong, unless the wrongful act abetted by him is actually done. It may, perhaps, be urged that in torts, we look only at the immediate cause of an injury and not at the cause of the cause of it, that in other words the abettor is too remotely connected with the injury to be held responsible for it. But this argument can hardly be sound, for, as pointed out by Sir F. Pollock "the rule will apply where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was immediate or not, does not matter. That which a man actually foresees is to him at all events natural and probable." *Ex hypothesi* an abettor cannot plead that he did not intend the act he abets, and he cannot, therefore, rely on the rule of remoteness of damage.

There may be cases, no doubt, where the person abetted instead of doing the act himself may instigate another to do it, and the question may then arise whether the original abettor is not too remotely connected with the final act to be held responsible for it. The answer to this may not be the same in all cases. If he could have foreseen that the act would be done by the actual doer of it, he would be responsible; otherwise he might not be. Or perhaps the rule may apply that a person who does a wrongful thing is liable for all the natural consequences that flow from it, whether he could have foreseen them or not, and thus the abettor may be held to be liable always whether the act is done by the person

whom he abetted, or by somebody whom the latter may instigate to do it. If an abetment of an act is considered so serious and so much of a menace to the public that it should be criminally punishable, we think there is no valid reason, why the abetment should not be held to be a civil wrong for which the abettor is liable in damages to the party wronged.

We think that these observations will apply to all torts affecting the person or reputation, personal relations in the family, or estate generally, or wrongs to property whether personal or real. In cases of negligence and breach of absolute duties specially attached to the occupation of fixed property, or to the ownership and custody of dangerous things, it may perhaps be doubtful whether abetment should be held to be wrongful. Such wrongs are analogous to violations of contractual rights. They were called wrongs *quasi ex delicto* in the Roman law and were distinguished from delicts strictly so called. It may, perhaps, be said that in such cases the antecedent right which is infringed is one against the owner of the property, and to hold an abettor liable would be to convert a right *in personam* into a right *in rem.* But supposing this argument to be well founded, we do not think that it furnishes any reason why abetment of other torts should not be held to be wrongful. There are two other possible arguments against holding abetment of a wrong to be tortious which it is necessary to notice. First, it may be said that if abetment is held to be wrongful, what the measure of the damages to be awarded against an abettor is to be, is not easy to decide and that there should be a substantial difference between the doer of a tort and the person who abets it. We do not think that this argument is well-founded. A tort-feasor is not entitled to call upon the court to make an accurate measurement of his wrong, and to fix the exact damages which he should be made to pay. If the argument were sound, it would equally apply to joint tort-feasors, for all of them may not be equally concerned in the wrong, and some of them may not profit by it at all, while others may gain a substantial advantage. As observed by the Privy Council in *Ganesh Singh v. Ram Raja*, 3 B. L. R., 44 in a criminal matter punishment may be apportioned, but in a matter of this description, where the plaintiff is to be compensated for the loss he has sustained, the law does not allow men to apportion their wrong, and does not apportion it for them * * * * * * *

If the matter were to be disposed of in a criminal proceeding

where the judge had to inflict a punishment or a fine, all that might be taken into account, but here in a civil proceeding to obtain a compensation for the loss the plaintiff sustained by the transaction for which all who joined it are responsible in the eye of the law, we have only to see that in point of fact all the parties are liable. We think there can be no injustice in making a person who instigates a battery equally liable with the person actually guilty of the battery for the whole damage caused by the wrongful act. It may sometimes be that a person may instigate another in insolvent circumstances to commit a tort. There are strong reasons why in such a case the abettor should be responsible for the whole damage. In a case like trespass or conversion where the actual tort-feasor gains a substantial advantage by taking possession of the property, and the abettor does not, it may seem hard that the abettor should be held liable for the whole damage. But suppose instead of being an abettor, he actually took part in the trespass, but never obtained joint possession with his co-tort-feasor, could he in this case also plead non-liability for the whole damage? We think there are substantial reasons for holding an abettor responsible for all the damages flowing from acts that he abets. The other argument we referred to is that in the case of some torts, as in the case of wrongs affecting property, there may hardly be any intention to do injury to another, and that it is not right that a person helping in an unintentional injury should be held liable, although the individual actually doing the injury may be guilty of a tort. This argument again, we think, is not sound. There is really no distinction in moral culpability between the person who does the act and the person who abets it; moreover, in instigation, there must be a certain amount of intention always present. We think the safer rule is to hold that in all such cases, the abetment of a wrong is itself wrongful.

We must for the present allow the subject to rest here. The question is both difficult and complicated, and the object of the article is to incite inquiry, and not to furnish a categorical solution of the question.

LIBERTY OF THE SUBJECT—HABEAS CORPUS.

On the 1st of June last, an application was made by a Brahmin to the High Court of Calcutta, for a writ of *Habeas Corpus*, directed to his father-in-law, to produce his wife, a minor who had not attained puberty alleged to be in illegal custody. The Court held that the husband of a Hindu girl-wife had no legal right to her custody until she attained puberty, and *semble*, that even if he had such legal right, the Court would not, having regard to the principles laid down for the determination of the appointment of guardians in Act VIII of 1890, give him the custody; *Re Mrinalini Dabi.* (1)

This case raises an interesting and difficult question upon the Liberty of the Subject, and we propose to consider the matter. "The Liberty of the Subject has always been considered a question of the gravest importance in England, and no one man, either there or here, can be kept in illegal custody for a single minute" (2). The foundation of the personal liberty of Englishmen is the Magna Charta, and the most efficacious remedy for violation thereof is the writ of *Habeas Corpus*, which existed at common law, and was taken legislative cognizance of by 31 Car II C 2. In India, in the days of the Supreme Court, the Presidency Towns enjoyed the same right of personal freedom, but in the Mofussil the right was denied, except to British Subjects, and to natives who were personally subject to the jurisdiction of the Court. The writ is coeval with the establishment of the Supreme Courts in the three older Presidencies in 1774, 1800 and 1823 respectively. The origin of the jurisdiction to issue this writ was referrible in Bengal to S. 4 of the Charter, and in Madras and Bombay to Ss. 8 and 10 respectively of their charters which gave the judges severally the power possessed by judges of the King's Bench in England, amongst which the power to issue the Writ at Common Law was held to be included within the meaning of the Charters (3). The writ does not appear ever to have been based on the statute of Charles II. itself (4) It was accordingly decided in the earliest cases that the judges

(1) See "*Englishman*" of June 1st and 9th. (2) *Per* Wells J in *Re Eldred* 1865 1 Hyde 173.

(3) *R.* v. *Warren Hastings*, 1775. Hyde's Notes: Morton 206; *R.* v. *Ram Govind Mitter*, 1781 Ib, 210; *Re Henrietta Browne*, 1792, Chamb Notes Morton 212 n; *Re Justices of Bombay*, 1829 : 1 Knapp 1 *arguendo*; *Minutes of Ryan, C. J. and Gray C.J. to Board of Control*, 1830. See Vol. VI of Papers &c. on Indian Affairs 281, 85, 86 printed 1831; and *Q.* v. *Amir Khan*, 1870, 6 B, L. R., 392. See case dated 9 Jan 1775 cited, *arguendo*, in 1 Knapp 1; *Re Maharanee of Lahore*, 1848, Tayl 428

severally possessed the power to issue the writ, but that the Supreme Court, as such, had not; (5) but notwithstanding the denial of the jurisdiction of the *Court*, all the Judges frequently took part in the proceedings subsequent to the issue of the writ (6), till it became the common practice to apply to a single Judge for the writ at vacation, and to the *Court* in Term (7).

The Supreme Courts have power to issue the writ directed to all persons resident within the Presidency Towns, wherein they had a general jurisdiction, (8) and in *R* v. *Monisse*, 1810 1 Str. 415, it issued against the titular Nabob of the Carnatic. The English law as to personal liberty prevailed therein as to all its inhabitants, (9) including alien natives (10). In the Mofussil several attempts were made to run the writs even in cases of persons not British subjects, nor subject in any way to the jurisdiction of the Supreme Courts (11), but it was ultimately laid down that the Supreme Courts had jurisdiction to grant the writ directed there only in the case of British subjects, or natives personally subject to their jurisdiction by inhabitancy or on other grounds recognized under their charters, e. g. service with the East India Company or with British subjects: (12) or in the case of abetments of illegal arrest within the Presidency Town, by natives not otherwise subject, (13) but not in respect of natives not so subject, (14) nor of jailors or Officers of Native Courts as such, (15) nor of natives imprisoned either under the authority of a Native Court Martial, (16) or of the native courts of the E. I. Co. generally (17).

The object of the writ is to provide, by summary process, against *illegal detention against the will of the person detained.* In the case of persons *sui juris*, when such detention is made out, the person is set at liberty: but in cases of persons *alieni juris*, a further question arises as to the future custody of the person

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per Peel C.J. (5) *R.* v. *Warren Hastings*; *R* v. *Ramgovind Mitter*; *Re Henrietta Browne*, supra. (6) See *Note* by Hyde I to *R.* v. *Ramgovind Mitter*, supra. (7) Morton 212 n (7) *Re Justices of Bombay*, 1829 1 Knapp 1. (4) *Re Maharanee of Lahore*, supra. (10) *R* v. *Monisse* supra. (Carnatic subjects); *Q* v. *Le Geyt* 1843 (Cutch subject); *Re Maharanee of Lahore*, supra (11) See Cases cited in *Re Justices of Bombay*, supra. *arguenda*, (12) *Re Muddosoodden Sandel*, 1815 Mor. Dig II p. 381; *R* v. *Goculnauth Mullick*, 1824 Morton 220; *Re Justices of Bombay*, 1829 supra; *R* v. *Shaikh Boodin*, 1846 Perry O. C. 434; *Re Maharanee of Lahore*, 1848 supra; *In re Foy*, 1850, 1 Tayl and Bell 211 (13) *Re Sreenauth Roy*, 1840, Morton 226. (14) *Re Justices of Bombay*, supra; *R* v. *Goculnauth Mullick*, supra (15) *Re Justices of Bombay*, but see *In re Foy* supra.

(16) *R.* v. *Shaik Boodin supra* (17) *Re. Justices of Bombay*; *R.* v. *Shaik Boodin*

confined, the question of his own choice of residence being immaterial, unless he has arrived at a certain age entitling him to liberty of choice. In these cases the court possesses a discretion, which will be exercised according to the circumstances of each case (18). But the court only decides, upon *Habeas Corpus*, the question of legality of custody, and not the rights of guardianship (19). We shall first consider the case of persons *alieni juris* (1).

European British Subjects:—In the case of such infants illegally detained, the Court, in the exercise of its discretion, will follow certain principles. It will pay proper regard, as well to the legal rights of the parties entitled to the custody, as to the welfare of the child. The father, if a proper person, cannot be deprived of his legal right to the custody of his legitimate children of whatever age, even against a blameless mother (20). If the father has voluntarily made over his child to another, who has thereupon made a settlement in favor of the infant, (21) or if the father is not a fit person, by reason of apprehension of cruelty or immorality or other cause, his strict legal rights at common law will not be enforced, on the ground of the welfare of the infant (22). It may be a question now, however, whether the principle of *Re Holmes* is not to be taken as subject to some qualifications. Having regard to the tendency of later English decisions to hold the ages of majority and of discretion not to be synchrnous, and to Indian statutes, it will probably be held at present that some limitation in reference to age must be placed to the paternal control of the child's residence, or at all events, custody. By the Indian Penal Code, S. 361, the father or other guardian is entitled to the custody of male infants till 14, and of female infants till 16, though the minority of such, under their personal law, (Act IX of 1875), may continue. It is true under act VIII of 1890, S. 17, the preference of an intelligent minor may, irrespective of any fixed age, be considered in the appointment of a guardian. But the Act lays down principles applicable in *suits for guardianship*, and expressly saves (See S. 3) the powers of the High Court under the charters, leaving it free to apply the rules of discretion then prevail-

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supra; *See In re Foy supra.* (18) *Re Holmes* 1864, 1 *Hyde* 99; *Exp. Intiazzoon* 1814, 2 *Str.* 107; *Re. Himnauth Bose*, 1 Hyde 111. (19) *Q* v. *Ogilvie*, 1847, Tayl Rep 137; *Q.* v. *Vaughan* 1870; 5 B.L.R., 418. *Re Thakormonee Dossee*, 1864, 1 Hyde 176; *Re Khatija Bibi*, 1870 5 B. L. R. 557; *R.* v. *Leggatt* 1852, 18 Q. B. 781; *Exp. Balaram* 1852, Perry O. C. 51 *Re. Mrinalini supra.* (20) *Re Holmes supra* (21) *Q.*v. *Bezonji*, 1843, Perry O. C. 98, *Q.* v. *Ogilvie supra* at p. 140; *Re Saithri* I. L. R, 16 B, 307 (22) *Re Holmes supra*; *Re Carran* 1864; 1 Hyde 143.

ing in *Habeas Corpus* cases. Besides, considerations in the appointment of guardians are not necessarily, by analogy, the same in the case of the question of legal custody under *Habeas Corpus*. The only question here is one of legal custody given temporarily, leaving the parties to settle the question of guardianship by a regular suit; while in suits for guardianship the custody given by the Court is more or less permanent. It should be remembered also that S. 17 of the Act enacts that the rules laid down are to be taken "*consistently with the law to which the minor is subject*" (S. 17 (1). Therefore, there is nothing in that Act to prevent the High Court from giving the custody of infants to persons legally entitled, till they have passed the ages of discretion according to English law and the Indian Penal Code. In the next place having regard to the trend of the recent cases, (23) it may be a further question whether the legal rights of a father, though a proper person in the sense of *Re Holmes*, will not give way to the alleged interest of the child in cases falling short of waiver of his rights or apprehended cruelty or immorality, *eg*, in cases of poverty and inability to maintain the present status of the child or the considerations mentioned in Act VIII of 1890, S. 17 (2). Again, it may even be a question whether the Common Law right of the father must not now give way to the rights of the mother under Act VIII of 1890, S. 17 (4) But it is contended that to apply the Guardian Act in these cases would be to change the nature of a proceeding under *Habeas Corpus* to a veiled suit for guardianship, and would nullify the words of S. 17 "*Consistently with the law to which the minor is subject.*" which implies "consistently with the personal law in India of the minor, other than the Act." These remarks save those on S. 17, (4) apply generally also to the cases of non-European British subjects. The case of *R* v. *Urilla* 1814 (24) in which the Madras Supreme Court refused to make over to the father, who was a fit person, a school girl of 14, but left her free to go to a lover, is certainly a strange decision, and opposed to *Re Holmes* and *Re Carran* supra. The law gives the custody of illegitimate children to the mother, even as against the putative father, and if there is no property or

(23). *Re Saithri*, 1891, I. L. R. 16 307 ; and the recent Calcutta case reported in the "*Englishman*" of June 1st and 9th.

(24) 2 Str. 88.

suit instituted, the Court on its Equity side cannot interfere with her ordinary legal custody (25). But if the mother was not a proper person, the principle of *Re Holmes and Re Carran* would apply. The case of a mother's right in respect of illegitimate children is subject to the remarks made on the rights of fathers to their legitimate children as regards their age of control and welfare. In *Exparte Intiazzoon*, (26) the Court, in its discretion and on the ground of the welfare of the children, refused to make them over to her mother, where it appeared she was a "Moor woman" of doubtful morals, where the children had property, and danger to their religion was imminent. The two last grounds seem hardly sufficient according to the later Bombay and Calcutta Supreme Court rulings (27) to set aside legal rights.

(2) *Hindu Minors.*—The cases upon the subject of the proper custody of Hindu Minors, both in the Supreme Court and in the High Court, are not always consistent, a result brought about by the application of the principles of Westminster Hall on *Habeas Corpus*, to Hindu life and social customs. In the majority of cases it has been held that the Court will not, on *Habeas Corpus*, deprive a Hindu father of his right under Hindu law to the custody of his children of either sex during their minority—while under 16 years of age, that being the age of discretion under that law—irrespective of the child's own desire, and notwithstanding its change of religion (28). In a few other cases it has been ruled that minority itself will not entitle the father to custody, but that if it appears to the Court, on examining the child, that it has sufficient intelligence, and is of age to choose its own residence, it will be allowed to follow its wishes, though it is still a minor under the personal law (29). On *principle* the first class of cases appears to be right. Considering that the nature of parental authority, under English law, in the case of European British subjects is different from that of the Hindu father under Hindu law, over his family, and that European minors are not subject to the same domestic control

(25) *Q. v. Fletcher* 1849, Perry O. C. 109, (26). 1814; 2 Str. 107, (27) *Re Brijonath Bose* Taylor 137; *Q. v. Nesbitt* 1843, Perry O. C. 103; *Re Culloor Narainsawmy* 1858, Mayne's Penal-Code note to S. 361. (Madras case).

(28) *Re Brijonauth Bose*, Tayl Rep., 139; *Q v. Nesbitt*, 1843; *Re Culloor Narainsawmy*, 1858, *supra*; *Re Himnauth Bose*, 1864, 7 Hyde, 111; *Q. v. Vaughan*, 1870, 5 B.L.R., 1418. (29) Madras Case in *Note* by *Perry, J.*, to *Q. v. Nesbitt, supra* at page 107; *Q. v. Ogilvie*, 1847 *supra*; *In re Wittoo*, 1865, Mayne *Note* to I. P. C., S. 361.

as the Hindu minor, it does not follow that because in the case of the former a discretion may be allowed to children while under minority, it must also be so in the case of the latter. This was the meaning of Sir M. Wells in *Re Himnauth Bose.* It should also be remembered that in these cases the alleged desire of the minor is the result of external influences. *Quære,* whether the Penal Code, S. 361, does not affect the case of males up to 14, but see the above case, which was decided after the passing of the Code. If the father has done anything to forfeit his right, or if he is an unfit person, his rights will not be enforced, (30), *e.g.*, where he is addicted to immorality and has failed to provide a husband for his daughter before puberty, (31) but poverty, of the father is no reason for taking away his right. (32)

The mother of a Hindu illgitimate minor child is entitled to its custody, as against the putative father, where there are no apparent circumstances to control her right (33). The question whether the principles of Act VIII of 1890 are applicable in *Habeas Corpus* proceedings was considered in *Re Saithri,* 1891, I. L. R., 16 B, 307 and in the recent Calcutta case (34). In the former, the Court held that the right of the mother of an illegitimate child would not be enforced, as she was a homeless pauper, and her application not *bona fide,* but alleged to be for an immoral object, and further that she was precluded from enforcement of her right, owing to having made the girl over to the Missionaries eight years before, and that it would be detrimental to the girl, who would soon earn her living and desired to do so, to make such an order, and that the true principle, under the English cases and Act VIII of 1890, was that the welfare of the girl, irrespective of age, is the main feature to be considered. *Semble.*—A boy of 14 and a girl of 16 have a right to choose their residence. This case, in so far as it considers poverty of the mother and her inability to preserve the status of the girl, and conversion to Christianity as grounds of refusing the legal right, is not consistent with *Q.* v. *Nesbitt,* nor in its result with *Re Brijonauth Bose, Re Julloor, Re Himnauth Bose, Q.* v. *Vaughan, supra.* The applicability of Act VIII of 1890 to the present question has been already considered.

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(30) *Q.* v. *Nesbitt supra* per *Roper, C. J.*; *Re Himnauth Bose, supra*; (31) *R.* v. *Kistnama Naick,* 1814, 2 Str. 81; (32) *Q.* v. *Nesbitt supra* per Roper C. J.

(33) *R.* v. *Nagappan.* 1814, 2 Str. 91. (34) See. "*Englishman*" of June 1st and 9th.

(3). *Mahomedan Minors.*—According to Mahomedan law the mother is entitled to the custody of male children up to 7, and of females up to puberty, and the Court will, on *Habeas corpus*, give her the custody against the husband, or his executors where she acts *bonâ fide*, and no allegation is proved against her morality. (35) As to rights of Mahomedan *fathers and masters*, saved by certain statutes, *see R.* v. *Monisse*, 1810, 1 Str., 415.

(4). *Parsi minors* :—A Parsi father has a right to the custody of his child during infancy, against his father in-law and the child's mother, and he cannot be deprived of his right, according to Parsi law and usage, by a sentence of divorce and deprivation of paternal rights pronounced by a panchayet, or by conversion to Christianity. The Court will intefere with parental control in cases of immorality of the father, and separation from child for its pecuniary benefit. *Roper C. J.* thought a betrothal by father would entail loss of paternal right to custody, but *secus*, *Perry J.* Desertion and repudiation of wife and child by father was not proved, but it was said by *Roper C. J.* that it would have amounted to a strong item on the other side (36).

We now pass to the case of married women. And (1) as to *European British wives.* The case of the wife is quite different from that of the infant. 'There the parent has a right to the custody of the child, and if it be of tender years, the Court will make an order for its restoration to him, but a husband has no such right at common law to the custody of his wife, and if she remains away, he must sue for restitution of conjugal rights (37). If a wife is detained by some person away from the husband, the Court on *Habeas Corpus* would not give him possession of her, but would set her free, (37) notwithstanding that he was in no way to blame. And a *fortiori*, where he has been guilty of cruelty, (38) or has separated under an agreement, (39) she will be simply released. The husband has no right to keep a wife in confinement, in order to prevent her leaving him; (40) if he does so, the Court will on *Habeas Corpus* set her free. So also where he so detains her for an improper object,

(35) *Re Tayheb Ally* 1865 2 Hyde, 163; *Re Hosseinee Begum*, 1881, I. L. R., 7, C, 434.

(36) *Q.* v. *Bezonji* 1843, Perry O. C. 91. (37) *R.* v. *Leagatt* 1852, 18 Q B. 781. See also *R.* v. *Jackson* [1891] 1 Q. B. 671; See *Ex-parte Balaram* 1852: Perry O. C. 516, (38)*R.* v. *Brooke* 1766, 4 Bur. 1991; *R.* v. *Turlington* 2 Ib. 1115. (39) *R.* v. *Read* 1758, 1 Bur. 542, *R.* v. *Lister* 1 str 478. (40) *R.* v *Jackson supra* over-ruling *Re. Cochrane* 1840, 8 Dowe 630.

or after a separation deed(41). He may, however, place a restraint on her, but not confine her where she squanders his property, goes into lewd company, (42) or is guilty of misconduct actual or apprehended (43). Cruelty on the part of the husband, or a course of gross insults will entitle her to her liberty on the writ (44).

As to *Hindu wives*, it was held in *Re Mrinalini Dabi*, supra, that the father of a Hindu girl who had not attained puberty and never lived with the husband, was, by Hindu Law, entitled to her custody against the husband; and that even if the husband had the right of custody, her welfare (loss of caste and doubt as to valid marriage) was to be considered under Act VIII of 1890, S. 17, and it required her to remain with her father: and further, having regard to S. 12, that it would not be proper to deliver her to the husband. As regards wives who have lived with their husbands, but have left them owing to the conversion of the latter to Christianity, it was held in Madras in *Lutchmee* v. *Ammal*, 1851, Perry O. C. 518; that the wife of 15 must be made over to the husband, irrespective of her wishes, but the Bombay and Calcutta Courts, under these circumstances, refused in *Exparte Balaram*, 1852, Pery O. C. 516, and *In re Thàkoormonee Dossee*; 1864: 1 Hyde 176, to make the custody over to the husband, but gave effect to the wishes of the wife. It seems, upon principle that rules applicable to an English wife, under the English law, regulating the rights of husband and wife, should not be extended to a Hindu (or Mahomedan) wife, as there is a world of difference between their relative domestic status as wives. Considering on the one hand, the comparative freedom of an English wife under English law, and on the other, the position of dependence of Indian women—a position not far removed from that of infants in this respect—it seems to be only right, that for the purposes of *Habeas Corpus*, the Court should not treat them as upon the same footing, in the matter of choice of residence, but rather hold that the latter are subject to control in the same way as Hindu children, that their case and that of children are the same. So that when all the parties are Hindus, the legal rights of the husband, if a proper person, should prevail, and the wife be made over to him, if she had under Hindu law, attained the proper age entitling the husband to her custody, irrespective of her wishes just as in the case of the minor and parent. Where one party had become a Christian and

(41) *R.* v. *Lister supra.* (42) *Ibid.* (43) *R.* v. *Jackson supra.* (44) *Ibid.*

was out-casted, it might be a question, under Hindu Law, whether the husband's right to custody was not lost, and the wife should not be left in the custody of her father, if under age, or set at liberty if she had attained majority, or the Court might hold that it would not in such a case give him the wife on the ground that he was not a "proper" person, and leave her in her present custody or set her free as the case may be.

The husband of a *Mahomedan wife* has no right to her custody as against the mother until she has attained puberty (45). In *Re Mahin Bibi*, 1874, 13 B. L. R, 160 the conflict was between the husband and the *father* neither of whom had the legal custody, but the dictum that though the mother's custody is illegal, that of the husband is not necessarily illegal, if it meant to lay down a rule generally, is open to the objection that in *Habeas Corpus*, if the legal custody of the minor is in one person, the actual custody of the other is not legal, *i e.* not permitted by that law (46).

The rules regarding infants would be applicable *mutatis mutandis*, to *lunatics* pending lunacy, but such persons would be entitled to a discharge upon recovery of reason, unless he was a criminal lunatic (47).

The rules regarding persons *sui juris* are clear. If their custody is illegal, and against their consent, they will be discharged by this writ.

Detention in jail under Court process. A judgment debtor imprisoned by an execution creditor is entitled to be discharged by the writ, under Act VIII of 1859 Ss. 276-278, if the subsistence money is not paid in advance (48). A witness is entitled to be released if he is arrested on civil process while in Court and in going and returning, (49) unless there is want of *bona fide* belief that his attendance was required (50).

Detention under order of Magistrate. Where the warrant was informal and the imprisonment in excess of the jurisdiction of a Calcutta Magistrate the accused was released. In two cases the Supreme Court discharged European British subjects detained by Mofussil J. P's on the ground of want of jurisdiction (52).

(45) *Re Khatija Bibi*, 1870, 5 B. L. R., 557. (46) See Q v. *Ogilvie*, supra per Peel C. J. (47) *Re Eldred*, 1865 1 Hyde 173. (48) *Speyer* v *Janssen*, 1865 Bourke O. C. 28. See other cases in the same Report. See also Q v. *Shearwood*, 1851, 2 Tayl and B 71. (49) *Re Omritolall Dey*, 1875, I. L. R., 1 C, 78. (50) *W. C. Dole* v. *Tiel*, 1875, 14 B. L. R., Ap. 13. (51) Q v. *Hume*, 1848, Tayl 368. (52) Q. v. *Siddulph*, 1850, 1 Tayl and B 507; Q v. *Brooke*, 1859, 2 Bone 158.

Detention under orders of the East Indian Company's Courts generally. The Supreme Courts had no jurisdiction generally to issue the writ to discharge persons confined in the Mofussil under the orders of the Native Courts, (53) unless in the case of European British subjects or natives subject to their jurisdiction. (54) They had no jurisdiction to release a native sentenced by a Native Court Martial, (55) but they discharged a European British subject sentenced by a British Court Martial held by a person who acted without jurisdiction, and when the sentence was not confirmed as required by statute (56).

Detention under orders of Governor-General in Council. Where a person is confined by such order under special statutes, the Court will not discharge the prisoner, though there is no warrant of commitment and the charge is not communicated to the prisoner, *e. g.* under 26 Geo. III C 16 S. 12 (57); or Reg. III of 1818 (58); or Reg. III of 1818, as extended by Acts XXXIV of 1850 (59) and III of 1858 (60). But if the Governor-General has no power under statute or Charter to pass the order and it is illegal, the prisoner will be released under the writ (61) *Vide* in connection with subject *Q* v. *Le Geyt,* 1843 Perry O. C. 397.

Although the commitment is good on the face of it, the Court can inquire into its validity, if the authority committing to custody is inferior to it (62), *e. g.* a Presidency Small Cause Court (63); a Presidency Magistrate (64); or a Mofussil Justice of the Peace (65), but not where the authority is co-ordinate with or altogether independent of its jurisdiction (66). The Court will examine the order of detention of a British Mofussil Court Martial (67), but not the order of the Govenor-General in Council, though there is no warrant of commitment (68), unless the order is based neither on Statute nor Court.

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(53) *Re Justices of Bombay,* 1829, 1 Knapp 1; *R* v. *Shaikh Boodin,* 1846, Perry O. C. 434, *In re Foy,* 1850, 1 Tay and B 219. (54) *In re Foy,* supra. See *Q* v. *Siddulph*; *Q* v. *Brooke,* supra. (55) *R* v *Shaikh Boodin,* supra. *Mark Porrett's Case* 1844; Perry O. C. 434.

(57) *R* v. *Gordon,* 1791, Mor. Dig. II 277. (58) *Re Maharanee of Lahore,* 1848. Tayl. 428. (59) *Re Tuckut Roy,* 1858, 1 Bone 354. (60) *Re Ameer Khan,* 1870, 6 B and R 392. (61) *R* v. *Symons,* 1814, 2 Str. 93. (62) *Re Omritolall Dey,* 1875, I. L. R., 1 Cal. 78. (63) Ibid. (64) *Q* v. *Hume,* supra. (65) *Q* v. *Siddulph*; *Q* v. *Brookes,* supra. (66) *Re Omirtolall Dey,* supra. (67) *Porrett's* case, supra. (68) *King* v. *Gordon*; *Q* v. *Le Geyt, Re Maharanee of Lahore*; *Re Tuckut Roy,* supra. (69) *R* v. *Symons,* 2 Str. 93.

The return to the writ is conclusive (70), and even if there was no appeal formerly (71), the order, if passed under C. P. C. S. 491, is appealable (72).

The jurisdiction of the Supreme Court passed by their Charters to the High Courts (73), including the power to issue the writ to the Mofussil. But by Cr. P. C. 1872 S. 82, the jurisdiction was limited to the Presidency Towns, and by S. 81 an analogous authority extending throughout the territorial limits of their jurisdiction, was given. By Act X of 1875 S. 148, however, the former jurisdiction within the Presidency Town was taken away in the cases specified in the Section. The original jurisdiction was therefore curtailed to this extent, but remained in cases not within S. 148. This Section, except clause (a), has been re-enacted, *verbatim*, in the Criminal Procedure Code 1882 S. 491, which does not however affect the residual jurisdiction, saved under Act X of 1875. The right of European British subjects unlawfully detained, to apply to the High Court, is provided for by S. 456.

Both in the Presidency Towns and in the Mofussil, the Code of 1882 gives also a limited jurisdiction to Magistrates (Vide Ss. 100, 551), in certain cases when persons are illegally detained.

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NOTES OF INDIAN CASES.

Hira Lal v. Saheb Jan, I. L. R., 18 A, 107. The rule that an accused person is incompetent to give evidence in the case is beginning to be regarded with disfavour. Several statutory exceptions have been made. The Evidence in Criminal Cases Bill recently introduced into Parliament in England if passed into law, will make the exception the rule. In this country there is vested in the Court the power to question the accused for the purpose of enabling him to explain the evidence against him. The Section of the Criminal Procedure Code dealing with maintenance does not belong to the department of criminal law proper, There is no reason, therefore, to apply the rule which now obtains in criminal cases that an accused person is ineligible to give evidence on his own behalf.

Ghulam Kadir Khan v. Mitsakim Khan, I.L.R., 18 A, 109. S. 85 of the Transfer of Property Act has received a very extended interpre-

(70) *Q* v. *Vaughan*, supra. but see *Contra*, *Re Khatija Bibi*, supra. (71) *Re Ameer Khan*, supra. (72) *Re Narrondas*, 1890, I. L. R., 14 Bom. 555. (73) *Re Ameer Khan*; *Re Saithri*, supra.

tation from the Allahabad High Court. It seems to us to be merely a rule of procedure which does not affect the validity of decrees obtained in contravention of it. An objection as to non-joinder of parties cannot be taken for the first time in appeal. See S. 34 Civil Procedure Code, *Rajnarain Bose* v. *The Universal Life Assurance Co.* I. L. R., 7 C. 594. We do not think S. 85 overrides the provisions of S. 34 of the Procedure Code. That Section merely lays down that all persons interested in the mortgage property are necessary parties to a mortgage suit, just as other provisions of law lay down that in a suit by one co-sharer of property for rent other co-sharers are necessary parties, or that in an action relating to partner-ship all the partners are necessary parties. S. 34 of the Civil Procedure Code treats the omission to take the objection as to non-joinder as a waiver.

Ganga Prasad *v.* **Chunni Lal,** I.L.R. 18 A, 113, The Allahabad High Court stands alone in holding that the word "property" in the Transfer of Property Act is used to denote the actual physical object but not an interest in property. From this it follows that a sub-mortgagee cannot obtain a decree for sale but can only obtain a money decree and attach in execution the mortgage interest of his mortgagor. We think this view is untenable. The decision in *Mata Din Kasodhan* v. *Kazim Husain,* I. L. R., 13 A, 432 has been dissented from in Madras. It seems to us that a mortgagee of a mortgage interest is entitled to bring a suit for sale of the interest mortgaged to him.

Jawahir Singh *v.* **Debi Singh,** I. L. R., 18 A, 119. An appeal was erroneously dismissed for default. *Blair* and *Burkitt,* J.J. hold that no appeal lay from an order refusing an application to restore the case to the file, under S. 588 Cl. 27. We think this decision is questionable. It has been held that where an appeal was entertained without jurisdiction a second appeal would lie to the High Court to set aside the decision on appeal. And by parity of reasoning we are inclined to think that an appeal lay from the order refusing to restore a case dismissed for default.

Jino *v.* **Manon,** I. L. R., 18 A, 125. We are glad to find that the Allahabad court has dissented from the ruling of *Muthusami Iyer* and *Shephard J.J.* in *Iyyappa* v. *Ramalakshmamma,* I. L. R., 13 M, 549. We have pointed out in 1 M, L. J. 152 the misconception as regards the supposed rule against inconsistent claims or pleas.

Salima Bibi *v.* **Sheikh Muhammmad,** I. L. R., 18 A, 131. *Chief Justice Edge* and *Burkitt* J. hold that an action by several plaintiffs, one of whom was the asignee of a share of the property from the other

plaintiffs was bad for misjoinder. If the prayer of the plaintiffs was several, some of them claiming possession of a part and the others the remainder of the property, there can be no doubt that the suit is bad for misjoinder and the course followed of asking the plaintiffs to elect which of them will proceed, has the support of *Sanders* v, *Wildsmith,* 1893 I Q B, 771, But if the plaintiffs sued merely for the recovery of the whole property, we doubt, whether the suit is liable to any exception. The first two plaintiffs were the original owners. Assuming the definition of the phrase 'cause of action' to be correct it would be unnecessary to consider the truth or validity of the assignment; for the first two plaintiffs who were the original owners consented to join the 3rd plaintiff along with them and the defendant was bound to deliver the property to the first two or all of them. Their Lordships held that several co-sharers claiming under the same title can bring one suit, The difference in the case, that the third plaintiff was an assignee of a share from the other plaintiffs cannot affect the principle,

Shirin Begam *v*, **Agha Ali Khan**, I, L, R,, 18 A, 141, There is no doubt that S, 11, Civil Procedure Code, refers only to cases of irregularity in publishing or conducting the sale, Where a sale is held illega for other reasons, that section has no application, But the Court has the power to set aside the sale or declare it void, We fail to see why the Court should have been so technical as to confine the party to the language of the section and refuse the relief prayed; see the cases noted under S, 311 O'Kinealy's Code,

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SUMMARY OF RECENT CASES.

Mortgage—Redemption order—Default mistake—Extension of time.

Collinson v. **Jeffery,** (1896, I Ch. D. 644 per *Kekewich J.*)

In a redemption suit the order generally is "In default of payment within . . . . this action do thenceforth stand dismissed with costs." When such an order is made and the time limited is allowed to pass without payment, it is not the practice to say that the action is dead after the expiration of such time, for it is necessary to make a further application in order to obtain the absolute dismissal of the action. The action is only *comatose*; it is moribund; but a final stroke is required to effect death. There is another form of the order sometimes available when extreme severity is required—namely "In default of payment the action does stand dismissed without further order."—when on the expiry of the time limited, the action, is considered dead.

Vide Transfer of Propriety Act S. 92,

The plaintiff mortgagor got an order for payment of the mortgage money in Court, which said ' that in default of payment within two months from this order the action be dismissed with costs". The plaintiff and his solicitor being under a mistaken impression that the two months began to run not from the date of the order being pronounced, but from its being passed and entered, did not pay the money within the two months but tendered it immediately after :—

Held, that, notwithstanding the expiration of the two months, the action was not dead, but that the Court had jurisdiction at the instance of the plaintiff, to extend the time limited by the order so as to include the actual date of payment, but that as this was only an indulgence granted to the plaintiff, he must pay the defendants' costs of the application.

Mortgagee taking possession—Six months' notice.

Bovill v. Endle, (1896, I Ch. D. 648, per *Kekewich J.*)

Where there is no term fixed in a mortgage and the mortgagor wishes to redeem, the mortgagee has an equitable right of insisting on six month's interest or six month's notice.

But if the mortgagee has himself demanded payment of the debt, or has taken any steps to compel payment of it, no notice by the mortgagor, and no payment of interest in lieu of notice is required whether the term, if any, fixed for redemption in the mortgage deed has expired or not.

Smith v. *Smith* (1891) 3 Ch. 550. *Letts.* v. *Hutchins*, L. R. 13, Eq. 176.

Entry into possession of the mortgaged property by the mortgagee is in effect a demand for payment, and the rule stated above applies when the mortgagee makes such entry.

Res judicata.

Shoe Machinery Company *v.* **Cultan**, [1896, 1 Ch. 667 per *Romer J.*]

The general rule of *res judicata* is that no Court shall try any suit or issue which has been previously heard and decided directly and substantially by a Court competent to try such subsequent suit or issue. Under this rule all grounds of defence which the defendant in a suit might or ought to have made in answer to the plaintiff's claim, whether based upon the same cause of action as that of the plaintiff or otherwise, are con-

sidered to be matter directly and substantially in issue, and such grounds cannot be enquired into in any subsequent suit as being *res judicata.*

Romer J., has decided in this case that the rule applies whether or not the defendant was aware, at the time of the institution of the first suit, of the ground of defence subsequently raised.

The plaintiff a patentee claimed damages for an infringement and an injunction, and the defendant denied the infringement. He also denied the validity of the patent, alleging, amongst other things, that it had been anticipated by certain specifications. The Court upheld the validity of the patent but granted no injunction or damages on the ground that no infringement was proved. The patentee brought a second suit against the same defendant for a similar infringement and the defendant again denied the validity of the patent, alleging that it had been anticipated by certain specifications, which were not known to him until after the judgment in the first action and which consequently were not then put by him before the Court.

Held (by Romer J.) That the validity of the patent was *res judicata*,

Per Curiam " He cannot be allowed to put part of his case, or to put his case in an incomplete manner. He is bound, when that question is raised, to search and find out all that he intends to rely upon in support of his contention that the patent is invalid."

Practice—Judgment by consent—Mistake

Ainsworth v. **Wilding**, [1896, I Ch., D., 673, per *Romer J.*]

After a judgment has been passed and entered, the Court that passed it cannot set it aside except in a fresh action brought for the purpose unless. (1) there has been a clerical error or an accidental slip in the judgment as drawn up—in which case the Court has power to rectify it under order XXVIII, v. 11 Judicature Act (2). The Court finds that the judgment as drawn up does not correctly state what the Court actually decided and intended. Even in these cases the Court will not interfere on motion unless the ground relied on is apparent on the record and does not require to be proved by fresh and conflicting evidence.

Semble, these rules do not apply to cases of interlocutory orders and to cases of final decrees where both parties agree, vide S. 206, of the Civil Procedure Code, Act XV, of 1882.

In this case a judgment was given by consent of all the parties. After the judgment was entered, one of the parties applied to set it aside on the ground that the consent upon which the judgment was based,

was given under a mistake on the part of the applicant. The other party opposed and contended that the Court had not jurisdiction.

Held by Romer J. That the Court cannot interfere on motion.

Restraint of trade—Severable agreement.

Dubowski and Sons v. Goldstein, [1896, I. Q. B. D. 479, C. A.]

The only test of the validity of an agreement in restraint of trade—according to the decisions of the present day—is whether or not such an agreement is reasonably necessary for the protection of the person with whom it is made.

The plaintiffs carried on the business of dairy men in a certain part of London and the defendant had been taken into their employment under a deed of agreement which contained a stipulation to the effect that he (the defendant) would not during the continuance of his service, or thereafter, serve or solicit or in any way interfere with any of the customers who should at any time be served by or then belonging to the plaintiffs in the said business. With respect to this agreement it was held.

(1). (Unanimously by the Court of appeal) that it was restricted to the particular locality of London where the plaintiffs were carrying on business and so was not void on the ground that it was unlimited in extent.

(2). By *Lord Esher, M. R. and Lopes, J.* That the stipulation was severable and was good with regard to customers of the plaintiffs who were such while the defendant was in their service.

(3). By *Rigby, J.* That the whole stipulation was good both with regard to the above mentioned customers and to others also who became such after the defendant left the service of the plaintiff.

For the Indian Law on the subject vide S. 27 Indian Contract Act.

Trustee—Cestuiquetrust—Breach of Trust—Contribution—Indemnity.

Chillingworth v. Chambers [1896, I, Ch. D. 685, C. A.]

In cases of breaches of trust the following rules regulate the rights and liabilities of trustees not only as between each other but also as between themselves and the beneficiaries.

(1). A cestuiquetrust cannot make a trustee liable for losses occasioned to him by a breach of trust which that cestuiquetrust has authorised and consented to.

(2). Where a cestuiquetrust induces a trustee to commit a breach of the trust for his own benefit and enjoys that benefit, the trustee committing the breach of trust has a right to be indemnified for any loss that he may sustain, by the cestuiquetrust who concurred in the breach and to the extent of his interest in the trust property and not merely to the extent of the benefit that he might have received by the breach.

(3). As between two defaulting trustees who are in parid elicto the one who has made good a loss occasioned by the breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other.

Difficulties often arises in the application of these principles and a conflict as between them if one of the trustees happen to be a cestuiquetrust also. The plaintiff and the defendant were co-trustees of a trust for the benefit of five beneficiaries one of whom was the plaintiff's wife. With the object of getting a high rate of interest for his wife and for himself subsequently if he survived her, the plaintiff, with the co-operation of the defendant invested some of the trust property in certain unauthorized funds; and this finally resulted in a loss to the trust estate. The plaintiff's wife died in the meanwhile and the plaintiff succeeded to her estate in the trust as one of the beneficiaries therein. Of the unauthorized investments made by the trustees, some were made during the life time of the plaintiff's wife and some after her death. The whole of the loss to the trust was re-couped out of the interest of the plaintiff in the trust estate. He now sued for contribution from the defendant his co-trustee. *Held*, the Court of Appeal confirming the decision of *North J*, that in a case of conflict like this the 3rd rule abovestated does not come into operation unless the abetting cestinquetrust has re-couped a loss over and above his share in the trust property and that as in the present case the plaintiff had still some of the trust estate left for himself, his suit ought to be dismissed.

Trade name—Right in name—Tendency to deceive.

Frank Reddaway & Co. *v.* Benham & Co. [1895, A.C. 199.]

The plaintiffs had for a long time been selling belting of a particular quality under the name of "camel hair belting" in the market. The defendants also manufactured belting of camel's hair and began to sell their belting also under the name of "camel hair belting" The plaintiff sued for an injunction preventing the defendants from using the expression they had all along been using. The case was originally tried before a single Judge with a jury, and the jury found upon the

facts, that the words "camel hair belting" had, apart from its natural meaning, acquired a secondary signification in connection with belting, that they did not convey to persons dealing in belting the idea that it was made of camel's hair, but that it was belting manufactured by the plaintiffs. They also found that the effect of using the words in the manner in which they were used by the defendants would be to lead purchasers to believe that they were obtaining goods manufactured by the plaintiff and that the defendants were well aware of this effect. Upon these facts the Court of Appeal [1895, 1 Q. B. 286] refused to grant the injunction. But the House of Lords reversing the decision of the Court of Appeal held that the plaintiffs were entitled to an injunction restraining the defendants from using the words "camel hair belting" as description of belting sold or manufactured by them without clearly distinguishing such belting from the belting of the plaintiffs.

The Court of Appeal and the House of Lords have not differed from the principle of law to be applied to cases of this description which is that no man has a right to represent his goods as the goods of another person and pass off such goods on the public as the goods of that other person. But Lord Esher (one of the greatest masters of the Law of England) who delivered the leading judgment in the Court of Appeal, held that in fairness and equity and common-sense and upon an adjustment of conveniences this rule must be held to be limited by another rule of law relating to the natural rights of persons, that a man, cannot be restrained by injunction from telling in the course of business that which is the simple truth although the public may be mislead by it, provided there was no fraud on his part in so doing. He said "the other manufacturer must put up with that, because the law cannot undertake to prevent a man from calling himself by his real name, and saying what is true about his goods." The House of Lords held that that there was no such exception as that laid down by the Court of Appeal and that the principle of law being clear it was only a question of fact in each case whether the defendants passed their goods off as that of the plaintiffs and upon the findings of the jury they gave a decree for the plaintiffs.

Lord Herschell (who gave the most elaborate judgment in the House) held that the defendants when they used a name which mislead the public, they were not telling the truth, as held by Lord Esher, even though that name truly described their goods, but that they thereby defrauded the public. "I am unable" he said "to see why a man should be allowed in this way, *more than in any other* to deceive purchasers into

the belief that they are getting what they do not, and thus filch the business of a rival." Lord Esher has defined simple truth from the stand-point of the person publishing the name while Lord Herschell has approached it from the stand-point of the persons to whom the name is published. But why the law should define truth from the stand-point of the public for the purpose of benefitting, not the public but a third person is not very clear.

Mortgage—Purchase of Equity of Redemption.

Liquidation Estates Co., *v.* Willoughby, [1896 I Ch. D. 726, C. A.]

Here is another case in which the doctrine of *Toulmine* v. *Steere,* (3 Mer. 210) was questioned, and the law relating to the rights of a purchaser who pays off a charge, to keep alive such a charge as against subsequent incumbrancers, definitely laid down. The law as thus laid down is almost in terms identical with S, 101 of the Transfer of Property Act. After referring with approval to *Adam* v. *Angell* (5 Ch. D, 634 635, 636) and the law therein laid down which was to the effect that where a purchaser pays off a charge he can keep it alive if he shows an intention to do so either by express declaration or by necessary implication—Lindley L. J. proceeds as follows. "Having regard to this decision it is perhaps now safe to go a little further, and to say that, where a purchaser of property pays off a charge on it, without showing an intention to keep it alive, it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence."

Infants—Custody—Misconduct of Father.

In re **Newton** (Infants), [1896 I Ch. D, 740 C. A].

Prma facie the father of an infant has the right to its care and custody and to have it brought up in his own religion. But the right of the state to the welfare of infants under its protection is paramount to that of the father and in a proper case, the court has jurisdiction to deprive the father of the custody of his child, and to disregard his wishes as to its religious education. In exercising such jurisdiction the Court will be much influenced by the conduct of the father.

Mortgagee—Power of sale.

Kennedy *v.* De Trafford, [1866, I Ch. D, 762 C. A.]

A mortgagee who has a power of sale is not a trustee of such power for the mortgagor; his right is to look after himself first. But he is

not at liberty to look after his own interests alone, and it is not right or proper, or legal, for him either fraudulently or wilfully, or recklessly to sacrifice the property of the mortgagor; that is all. If under a proper and bona fide exercise of the power of sale he sells the property to one of his two or more mortgagors the sale is not invalid even though no notice was given to or consent taken from the other mortgagors. There is no fiduciary relation between co-tenants of real estate prohibiting one of them from buying or getting in for his own benefit an outstanding incumbrance or estate therein.

Trespass to land—Measure of damages.

Whitwham *v.* Westminister Brymbo Coal & Coke Co. [1896, I Ch. D, 894 per Chitty J.]

The plaintiff was the owner of 1 A. 3 R. 9 P of land situated adjacent to the colliery of the defendants. The defendants had used this land for the deposit of spoil from their colliery and in the course of their operations had covered 3 R. 20 P. with spoil. In a suit by the plaintiff for damages and for injunction, the Official Referee had assessed the damages at a certain amount taking as the measure of damages the diminished value of the plaintiff's land in extent 1 A. 3 R. 9 P. caused by the defendant's trespass. The plaintiff contended that the proper measure of damage was the reasonable value to the defendants of the whole of the plaintiff's land for tipping purposes. *Held* by Chitty J that the principle of way-leave cases also applies to a case of tipping, the principle being that a wrong doer shall not make a profit out of his own wrong.

That the value of the land for the purpose of which it was actually used by the wrong doer should be taken into consideration in assessing the damages for so much thereof as was actually covered with spoil, and that as to the rest the measure of damages was the diminished value thereof to the plaintiff by reason of the wrongful act of the defendants.

Scottish Law—Double portion to children—State's function.

Johnstone and others *v.* Haviland and others, [1896, A. C. 95.]

The rule of English law against double portions to children does not obtain in Scotland. The principle embodied in the maxim "*Debitor non-presumitur donore*" is one of common sense; it is only this, that a debtor is not presumed to make a gift. Where a debtor makes a dis-

position of his property in favour of his creditor under circumstances such that a gift would be presumed in the case of a person who was not his creditor, it will not be presumed in the case of a person who is; it will then be regarded as a discharge of the obligation. But if there are circumstances the other way which would show that he did not merely intend the discharge of an obligation, but that he made the creditor an object of his bounty, then it is as effectual as if no such relationship existed between them. It is therefore in each case a question of fact to be determined whether the debtor did not intend his disposition to be a satisfaction but intended it to be a gift.

Mortgage—Consolidation.

James Pledge *v.* **White and others,** [In the third series 1896. A. C. 187.]

In the province of law reason has sometimes, to bend before precedent and the Courts have only to raise a cry for help from the Legislature. The doctrine of consolidation has been over and over held of late by Judges to be unreasonable and mischievous; but it has so firmly rooted itself in the law of England that it is now found impossible for Courts to overthrow it. The Lord Chancellor said in this case—"I think the principle laid-down in *Vint* v. *Padget*, (1 Giff. 446, 2 D and J. 611) has been so firmly established now by authority in our technical system of law that I feel more mischief would be done by dissenting from it, than by acquiesing in it."

Therefore where the owner of different properties mortgages them to different persons and all these mortgages are afterwards purchased by a *single individual,* that individual has a right to consolidate all his mortgages and refuse to be redeemed of any one of the properties until all his debts are paid; and this he can do not only against the mortgagor but also againt any person to whom the equity of redemption of these properties might have been assigned, even though such assignment took place before the mortgages vested all in one. The right to consolidate is not a mere equity and a personal right.

The decision of Romer J. and the Court of Appeal (1894 2 Ch. 328 *Pledge* v. *Carr*, [1895,] 1 Ch. 51) affirmed.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following Legal publications:—

The Educational Review for July 1896 (*in exchange.*)

Geen Bag for June 1896 (*in exchange.*)

Harvard Law Review for July 1896 (*in exchange.*)

Allahabad Weekly Notes for July 1896 (*in exchange.*)

The Canadian Law Times for June 1896 (*in exchange.*)

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Sir Nicholas Bacon, who was keeper of the great seal of England, when Queen Elizabeth in her progress, came to his house at Gorhambury, and said to him, 'My Lord, what a little house you have gotten!' answered her, 'Madam, my house is well, but it is you that have made me too great for my house."—(*Bacon's Apothegms*).

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Anecdote of Sir W. Noy, Attorney-General to King Charles The First.—Three graziers at a fair left their money with their hostess, while they went to transact their business. A short time after one of them returned, and under pretence that they had occasion for tho whole money, received it from the hostess, and made his escape with it. The other two sued the woman for delivering that which she had received from the three, before the three came and demanded it. The cause was tried and a verdict found against the woman; when Mr. Noy then making his first appearance at the bar, desired to be feed by her, because he could not plead without it. He then moved in arrest of judgment, that he was retained by the defendant and that the case was this;—the defendant hath received the money of the three together, and confesses that *she was not to deliver it until the same three demanded it*, and therefore the money is ready,—*let the three come, and it shall be paid.* This motion altered the whole course of proceeding and first brought Mr. Noy into notice.

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" *Sir Thomas Moore* had only daughters at the first,, and his wife did ever pray for a boy. At last she had a boy, which being come to man's estate proved but simple. Sir Thomas said to his wife, " Thou prayedst so long for a boy, that he will be a boy as long as he lives."—*Bacon's Apothegms.*

Lord Chief Justice Holt.—In the reign of Queen Anne, 1704, several freemen of the Borough of Aylesbury, who proved their qualifications, were refused the liberty of voting at the election of a member of Parliment. The law in such cases imposes a fine on the returning officer of 100£ for every such offence. On this principle, they applied to Lord Chief Justice Holt, who ordered the officer to be arrested. The House of Commons, alarmed at this step made an order of the House to make it penal for either Judge, Council, or Attorney, to assist at the trial; however, the Lord Chief Justice and several lawyers were hardy enough to oppose this order, and brought it on in the Court of King's Bench. This house highly irritated at this contempt of their order, sent a Sergeant at Arms for the Judge to appear before them; but that resolute defender of the laws, bade him, with a voice of authority, "be gone"; on which they sent a second message by their Speaker attended by as many members as espoused the measure. After the Speaker had delivered the message, his Lordship replied to him in the following remarkable words; "Go back to your chair, Mr. Speaker, within this five minutes, or, you may depend on it, I will send you to Newgate. You speak of your authority; but I will tell you I sit here as an interpreter of the laws, and a distributer of justice, and were the whole House of Commons in your belly, I would not stir one foot!" The Speaker was prudent enough to retire, and the House were equally prudent in letting the affair drop.

The same Judge had sent, by his warrant, one of the French prophets, a foolish sect that started up in his time, to prison; upon which Mr. Lacy, one of their followers, came to my Lord's house and desired to speak to him. The servants told him their lord was not well, and saw no company that day, "But tell him," said Lacy, "that I must see him, for I come to him from the Lord God." Which being told the Chief Justice, he ordered Lacy to come in, and asked him his business. "I come," said he, "from the Lord, who has sent me to thee, and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou hast sent to prison." "Thou art a false prophet, and a lying knave," answered the Judge. "If the Lord had sent thee, it would have been to the Attorney-General, for the Lord knows it is not in my power to grant a *nolle prosequi*, but I can grant a warrant to commit thee to bear him company, which I certainly will."

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Sentencing a man for Contempt of Court in refusing to drink Beer.—we were to devote our attention to the antics of judges, we should

have no space in these pages for any thing else. One of the latest is the caricature of justice made by a judge at Wichita, Lansas, in committing an expert witness in a prosecution under the prohibitory liquor law, for contempt of court because he refused to taste of some beer which had been uncorked for him in the court, so as to testify whether it was beer or whether it was something else under which name it had been sold.—*The American Law Review.*

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Making Masonic Signs to Judges on the Bench:—We take the following from the *American Lawyer*:—An Indiana man was recently committed to jail because he appeared in court wearing a masonic pin and made masonic signs to the judge on the bench, with the apparent purpose of assisting his brother, who was a litigant in the court. The judge, who is a Mason, first directed the man not to interfere in the proceedings, and afterwards ordered a court officer to arrest the offender. Judge Seymour D. Thompson of St. Louis, in an issue of the *American Law Review*, which had appeared before the Indiana incident had occurred, says that while sitting on the bench, signs had been made to him by members of the bar of such a uniform character that he believed them to be the signs of some secret order. Judge Thompson is not a Mason. The editor of the *Chicago Law News*, who is high in the councils of Masonry, believes that the Indiana Judge was right in committing his Masonic brother to prison if he attempted to influence the court and the jury by giving the Masonic Sign of distress.—*The American Law Review.*

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Carriers of Passengers: Not liable for failure of conductor to awaken a sleeping Passenger.—In Missuori &c., &c., Co., v. *Kendrick*, the Texas Court of Civil Appeals hold that where a railway conductor promises to awaken a passenger at the station where he is to get off, but fails to do so, whereby he is carried beyond his station and post to damage and inconvenience, there is no liabilty on the part of the railroad company. There are other cases so holding and the Texas court reviews them at length; but we do not believe they are sound or just.—*The American Law Review.*

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Injunction—Against healing the sick by the Laying on of hands and other divine Methods.—The nearest attempt at suing out an injunction against the Almighty, which we have any knowledge, occurred recently in the Superior Court of Cook county, Illinois, at Chicago, in the case

of *Maguire* v. *Dowie.* John Alexander Dowie claimed and claims the power to heal the sick by bringing Almighty God to his aid, through prayer and the laying on of hands. This devine power he brings to bear successfully upon all diseases which human flesh is heir to. He went into a respectable residence neighbourhood of Chicago, rented some vacant ground and erected a large rough building and put upon it the sign, "International Divine Healing Association"; and there before large audiences that were ignorant and prejudiced enough to be his dupes, he carried on, the alleged work of "divine healing." Two adjacent property owners brought an action in equity to enjoin the business there carried on, and Judge Payne, after hearing the allegation and proofs, refused the injunction. He proceeded on the ground that the evidence failed to show that the establishment was a nuisance. But why did not Dowie and his able counsel demur to the bill for a defect of parties, on the ground that Dowie's devine coadjutor had not been made a party defendant to the bill.—*The American Law Review.*

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College Degrees—Judicial Interference with Faculty Action:—The power of college authorities in the matter of granting degrees is generally regarded as absolute. For a disappointed student to take his case to the courts is therefore somewhat surprising. Yet this has occasionally been done, and a comparison of the few decisions is interesting. Curiously enough, the New York Supreme Court has been called upon three times within five years to pass on an application for a mandamus to compel the granting of a degree to a student. In *People* v. *N. Y. Homœopathic Medical College, &c.*, 20 N. Y. Supp. 379, and in *People* v. *N. Y. Law School*, 68 Hun, 118, the application was refused, the court remarking, in the latter case, that a college faculty is vested with broad discretion as to the persons to be recommended for a degree, and that the case must be an extraordinary one to justify judicial interference. On the other hand, in *People* v. *Bellevue Hospital Medical College,* 60 Hun, 107, the mandamus was granted, on the ground that the refusal to bestow the degree was arbitrary, and that it was not a case of the exercise of discretion. See 5 *Harvard Law Review*, 205.

The statement of the court in the last named case to the effect that when a student matriculates according to the terms of the published circular of the college, a contract arises seems open to objection. That the relation between student and faculty is not contractual has recently been decided in England. In the case of *Green* v. *Master and Fellows of St. Peter's College, Cambridge,* reported in 31 Law Journal, 119, the

plaintiff, who had been expelled from the defendants' college, brought an action for breach of contract, advancing the proposition that a student, on entering a college, enters into a contract with the college authorities, who agree, in consideration of his obeying all lawful rules and paying fees, to allow him to reside at the college for the length of time necessary for obtaining a degree, and to do all things requisite to enable him to obtain such degree. Mr. Justice Wills held that there was clearly no such contract, and that the case did not justify judicial interference. This decision, which finds some support in the interesting case of *Thomson* v. *University of London*, 33 Law J. Rep. Ch, 625, seems eminently sound.

That courts are very loath to interfere with the exercise of discretionary powers by college authorities is shown by several American cases in which aggrieved students have vainly sought relief at law from disciplinary measures adopted by faculties. See *People* v. *Wheaton College*, 40 Ill. 186 ; *North* v. *Trustees of University of Illinois*, 137 Ill. 296 ; *Dunn's Case*, 9 Pa. Co. Ct. Rep. 417.

People v. *Bellevue Hospital Medical College*, *supra*, appears to stand alone. Whether a mandamus should issue even in such a case may perhaps be doubted. And yet it seems only just that the student should have a remedy. Fortunately, the rarity of such arbitrary action on the part of college authorities renders the question one of speculative rather than practical interest.—*The Harvard Law Review.*

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Malicious Prosecution of a Civil Suit without Arrest or Attachment.—In *Savile* v. *Roberts*, 1 Ld. Raym. 374, Lord Holt laid down the proposition that any one of three sorts of damage would support an action for malicious prosecution, namely, damage to a man's fame, to his person, or to his property. That a prosecution for a crime, which involves the first sort of damage, the bringing of a civil suit with arrest of the person, which involves the second, and the bringing of a civil suit with attachment of property, which involves the third, are actionable if induced by malice and without reasonable cause, is universally admitted. But where a civil suit is unaccompanied by arrest of the defendant's person, or attachment of his property, it has often, perhaps generally, been held that the law must regard the costs which the defendant recovers as a sufficient recompense, and that he can bring no action for malicious prosecution. See the opinion of Bowen, L. J., in *Quartz Hill Gold Mining Co.* v. *Eyre*, L. R. II Q. B. D. 674, 689 ; *Potts* v. *Imlay*, 1 South. 330 ; *Wetmore* v. *Mellinger*, 64 Iowa, 741. On the other hand, in

Lipcomb v. *Shofner*, 33 S. W. Rep. 818, the Tennessee court recently held that an action would lie under such circumstances, and this decision finds considerable support in this country. See *Closson* v. *Staples*, 42 Vt. 209; *Eastin* v. *Bank of Stockton*, 66 Cal. 123; *Woods* v. *Finnell* 13 Bush, 628.

It is generally admitted that some action of this nature lay at common law. But since the Statute of Marlbridge (52 Hen. III.), which allowed costs to successful defendants *pro falso clamore*, no such action has been sustained by the English courts. Those costs apparently include "the attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in the court." 21 Am. Law Reg. N. S. 370. In this country costs are much more sparingly allowed, and are often far from a recompense for the damage sustained. It is on this ground that many of the American courts have allowed the action, Their conclusion seems certainly logical, and in accord with the general principle on which the action for malicious prosecution is based. Manifestly, in the expense to which he is put the defendant suffers damage of a sort covered by Lord Holt's analysis; and if that damage, resulting as a natural consequence of the plaintiff's malicious act, exceeds the amount of costs given under a system which makes no attempt at complete compensation, the defendant should be allowed to make good the loss by another action. The main argument against allowing it, that it would encourage interminable litigation, hardly seems conclusive. See, for a full discussion of the subject, 21 Am. Law, Reg. N. S. 281, 353.—*The Harvard Law Review.*

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A Modification of Lawrence v. *Fox—Bank Checks.*—That inconsistencies are pretty sure to follow when courts adopt a rule fundamentally wrong in principle is well illustrated by the difficulties which are being experienced by those courts which have adopted the rule of *Lawrence* v. *Fox*, (20 N. Y. 268), namely, that a promise by A to B to meet B's debt to C will support an action by C against A although C was not a party to the contract. Such an action would not have been tolerated by the old common law, but the doctrine has gained a foothold in many of our jurisdictions. (See 8 Harvard Law Review, 93; 9 Harvard Law Review, 233.) Among the States which apply this rule there are some, including New York itself, which hold that a promise by a bank to its depositor that it will pay the depositor's debts to third persons (checkholders) will not support an action by the check-holders against the

bank. It is hard to see how the cases can be reconciled on any principle, but as there is no common law principle at the bottom of the rule in *Lawrence* v. *Fox*, the inconsistency may presumably be treated as a determination on the part of those courts to narrow the scope of the rule, and not to apply it where the third party is merely one of an undetermined class of the promisee's creditors, instead of being a single creditor definitely named by the contracting parties.

The New York court in *Ætna Bank* v. *Fourth Bank*, (46 N. Y. 82, 87) endeavored to distinguish the cases as follows: "*Lawrence* v. *Fox* was upon an express promise to pay a sum of money, received by the defendant from a debtor of the plaintiff, to the plaintiff; and the promise was the consideration upon which, and upon which alone, he received the money. . . . Here the defendant was a debtor upon a general banker's account; there was no special loan on an express promise to pay the plaintiff." In New Jersey this inconsistency exists (*Huyler's Executors* v. *Atwood*, 26 N. J. Eq. 504; *Creveling* v. *Bloomsbury Bank*, 46 N. J. Law, 255); and in Pennsylvania also (*Merriman* v. *More*, 90 Pa. St. 78; *First Bank* v. *Shoemaker*, 117 Pa. St. 94); but in the latter State they allow a suit if the check is for the whole amount of the deposit (*Saylor* v. *Bushong*, 100 Pa. St. 23), on the theory that such a check is an assignment of the funds in the bank,—an objectionable doctrine, it would seem, when it is remembered that a bank, instead of holding any specific funds of the depositor, is merely his debtor, and that a check is an order to pay, in the nature of an unaccepted bill of exchange. In Maryland and Michigan, States which follow *Lawrence* v. *Fox*, the courts seem to deny the right of a check-holder to sue the bank, although the point does not appear to have been directly adjudicated. (*O'Neal* v. *School Commissioners*, 27 Md. 227; *Moses* v. *Franklin Bank*, 34 Md. 574; *Crawford* v. *Edwards*, 33 Mich. 354; *Brennan* v. *Merchants' Bank*, 62 Mich. 343.) Perhaps the most interesting example of this inconsistency is in Colorado. In *Lehow* v. *Simonton*, (3 Colo. 346), a third party, to whom the money was by the contract to be paid, was allowed to sue on the contract but in *Boettcher* v. *Colorado Bank*, (15 Colo. 16), a suit by a check-holder against the bank was decided in favour of the bank; one judge, however, feeling himself bound by *Lehow* v. *Simonton*, dissented, on the ground, that the cases were indistinguishable.

A number of authorities on this point are cited in a recent and carefully considered case in Ohio (*Cincinnati, H. & D. R. R. Co.* v. *Metropolitan Bank*, 42 N. E. Rep. 700), which holds that the check-holder has no right of action against the bank for refusal to pay the check.—*The Harvard Law Review*.

Converson by a Pledgee.—Two recent cases, *Waring* v. *Gaskill*, 22 S. E. Rip.659 (Ga.), and *Richardson* v. *Ashby*, 33, *S. W.* Rep. 806 (Mo.), are authority for the proposition that where a pledgee tortiously sells his pledge or repledges it for a greater sum than the debt for which it is security the pledgor has an immediate right to bring an action in trover without tendering the amount of his indebtedness. What little law there is on this subject is unsettled. It would seem the more natural step to bring an action for violation of the contract of pledge, or to tender payment before bringing the action of trover. In the action on the contract, at least an equitable defence would be allowed. The plaintiff's damages would be diminished by the amount of his debt to the defendant, the pledgee.

On the precise question involved in the two cases cited, there is a conflict of opinion. In England the law is contrary to these authorities. The first English case on the subject, *Johnson* v. *Stear*, 15 C. B. N. S. 330 held that the pledgee's act was conversion, but that the amount of damages should be only the pledgor's actual loss,—that the pledgee's interest in the pledge at the time of the conversion should be taken into account. Mr. Justice Williams in an able dissenting opinion maintained that the pledgee stood in practically the same position as a factor,—that by his act the pedgor regained immediate right of possession, and was entitled to judgment in trover for the full value of the goods. Obviously, if there was conversion at all, full damages should have been awarded. Two latter cases, *Donald* v. *Suckling*, L. R. 1. Q. B. 585, and *Halliday* v. *Holgate*, L. R. 3 Ex. 229, practically overruled *Johnson* v. *Stear* by holding that there was no conversion. To support this view, the court maintained that a pledge is something more than a mere bailment, and that the pledgee, by parting with possession, does not lose his special property in the pledge. Mr. Justice Shee dissented in *Donald* v. *Suckling* on the grounds put forth by Mr. Justice Williams in the earlier case. Nevertheless, these two cases represent the English law.

In the United States the question is still open. Some courts adopt the English view without question or hesitation. Others maintain the views adopted by Georgia and Missouri courts. The English doctorine would seem to be the less satisfactory. There is no cogent reason for holding that the pledgee gets so much more extended rights than a bare bailee that he can dispose of the article pledged without losing his lien. It would seem more natural and consistent that, apart from the privilege of pledging up to the amount of the original security,—a proceeding which in no way affects the first pledger's position,—the pledgee

should have no more right than the factor holding his principal's goods, on which he loses his lien in parting with possession just as the pledger may maintain trover for destruction of the pledged goods by the negligence of the pledgee, so should he be allowed trover when the pledgee has repledged the goods for an amount greater than the original pledgor's indebtedness to him.—*The Harvard Law Review.*

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Contracts—Accord and Satisfaction.—Plaintiff and defendant disagreed as to the amount due the former as commission for a sale. Defendant sent a check for the amount admitted by him to be due plaintiff, and enclosed a voucher, to be signed and returned by plaintiff, acknowledging receipt of the check "in *full* payment for commissions." Plaintiff kept and used the check, but did not return the voucher. *Held*, by accepting the check, plaintiff had precluded himself from disputing the fact that the check was full payment. *Nassoiy* v. *Tomlinson et al.*, 42, N. E. Rep. 715 (N. Y.)

The claim here being for an unliquidated sum, and plaintiff having accepted the check, an accord and satisfaction is fairly shown. Plaintiff had no business to keep and use the check otherwise than on the conditions on which it was sent. As the court aptly put it. "When he indorsed and collected the check referred to in the letter asking him to sign the enclosed receipt in full, it was the same in legal effect, and if he had signed and returned the receipt because acceptance of the check was conclusive election to be bound by the condition upon which the check was offered." Two Parsons on Contracts, 8th ed , p. *687 and note *t*, has a discussion of the subject. In connection with this subject it is interesting to note a case just decided in Michigan, where plaintiff, having received a sum for wages minus the amount of a railway fare, which defendant expressly refused to allow, and having given a receipt in *full*, was held thereafter precluded from successfully suing on the claim for the fare, though both parties admitted the sum actually paid to be due so far as it went. *Tanner.* v. *Merrill* 65 N. W. Rep. 664. (Mich.) Two judges dissent, on the ground that payment of a debt admittedly due is no consideration for a discharge of a further claim. But as the two claims were not separate, and the payment and receipt were given for a lump amount which was unliquidated, the case would seem to be analogous to the New York case.—*The Harvard Law Reveiw.*

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Contracts—Illegality.—The plaintiff and defendant had entered into a partnership to carry on certain faro and crap games. The plaintiff

now sues for his share of the proceeds in the hands of his partner. *Held*, that where the illegal contract has been carried out, the illegality of the contract is not a bar to calling the partner who holds the profits to account. *McDonald. v. Lund*, 43 Pac. Rep. 348 (Wash).

The decision in this case is carefully reasoned out and well supported by authorities cited, yet it does not appear sound. The plaintiff's claim is founded on the contract, and allowing a recovery is carrying the contract into effect. The better mode of dealing with such cases is to leave the parties remediless. The vice of the contract enters into the settlement, and the law should interfere to aid neither when both are *in pari delicto*. *Dixon* v. *Olmstead*, 9 Vt. 310; *Embrey* v. *Jemison*, 131, U. S. 336; *Harvey* v. *Merrill*, 150 Mass. 1; 2 Parsons on Contracts, 8th ed. p. 747 and cases cited.—*The Harvard Law Review.*

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Contracts—Public Policy—Agreement to Waive Claim for Negligence.—Where an employee joins a voluntary relief association to which he contributes, and his employers guarantee the obligations, pay the operating expenses, make up deficits in the fund, supply surgical attendance, etc., an agreement by him in his voluntary application for membership that acceptance of benefits from the association for an injury shall operate as a waiver of his claim for damages is not void as against public policy. *Otis* v. *Pennsylvania Co.*, 71 Fed. Rep. 136.

Where under a similar agreement he elects to accept aid from the association in ignorance of the strength of his claim against the company, it was *held* in another recent case that the effect of his election, in barring an action against the company, is not avoided. *Vickers* v. *C. B. & Q. R. R.* 71 Fed. Rep. 139.

Both decisions are amply supported by the authorities cited. It is the election given to the employee either to receive aid from the association or to sue the company, that removes the objection that the contract is one to avoid liability for one's own negligence. Contracts of the latter class are of course void. *Roesner* v. *Hermann*, 8 Fed. Rep. 782; *Runt* v. *Herring*, 21 N. Y. Supp. 244.—*The Harvard Law Review.*

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Corporations Ultra Vires Contract—Surety.—A. contracted with a county to furnish water supply. B. signed A's bond as surety. The county paid the contract price in advance and A refused to perform, on the ground that the contract was *ultra vires*. *Held*, (1) A. is liable to

the county on a *quantum meruit* for the consideration so paid; (2) B. cannot be held as surety for this liability. *Edwards County* v. *Jennings*, 33 S. W. Rep. 585 (Tex.)

It is well settled in many jurisdictions that where one party to a contract has performed and the other party repudiates and sets up the defence of *ultra vires*, the party so repudiating is liable on a *quantum meruit*. See *R.R. Co.* v. *Keokuk Co.*, 131 U. S. 389. The principal case is interesting as bringing out very clearly the nature of this liability. It results from the invalidity of the contract, and is not in any sense grounded on the contract itself. Therefore, the surety whose liability was only on the contract was not bound. The rule that a surety will not be held beyond his original liability is elementary. See opinion of Judge Story in *Meller* v. *Stewart*, 9 Wheat 680.—*The Harvard Law Review.*

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Gifts of Growing Crops—Delivery.—A life tenant of certain land gave plaintiff by parol a growing crop of corn. Before the crop was ripe, the life tenant died, and the remainderman conveyed his interest in the land to the defendant. Plaintiff brings an action to enjoin defendant from appropriating the crop to her use. *Held*, that life tenant could dispose of growing crops by gift, and his gift to plaintiff was valid. *Shaffer* v. *Stevens*, 42, N. E. Rep. 620 (Ind.)

It is well understood that a gift, unaccompanied by actual or constructive delivery of the property given, is not valid. In *Noble* v. *Smith*, 2 Johns (N. Y.) 52, Chief Justice Kent decided that growing corn was susceptible of delivery only by putting the donee in possession of the soil, and that anything less than this left the gift ineffectual. It would seem, therefore, in the principal case, that the growing corn passed to the life tenant's executor (Taylor, Landlord & Tenant, S. 534), and that the plaintiff had no interest in it.—*The Harvard Law Review.*

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Judgments—Res Adjudicata.—The defendant was arrested and an order of deportation issued under the Chinese Exclusion Act. She had previously been arrested and discharged on *habeas corpus* proceedings. *Held*, that though the discharge was obtained by perjury and a fradulent writing, it was decisive of the present case, and the order of deportation must be reversed. *U. S.* v. *Chung Shee*, 71 Fed. Rep. 277.

This is sound, and in accord with previous decisions. Collateral impeachment of a judgment in *habeas corpus* can be made only on the

ground of want of jurisdicton. Freeman, Judgments, S 619. Judgments in general are not subject to collateral attack by parties on the ground set forth in this case. See Freeman, S 334, and Wells's Res. Adjudicata, Chap. I. Sec. 9.—*The Harvard Law Review.*

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Life Insurance—Rights of Beneficiary.—By statute the beneficiary in a life policy is entitled to the proceeds of the policy, not exceeding £ 10,000 free from the claims of creditors of the insured, though the premiums were paid by him. *Held*, that a man's wife, the beneficiary in several policies maintained by him, may retain the proceeds, though it turns out his estate is bankrupt and the proceeds exceed £ 10,000, since it did not appear that he paid premiums after bankruptcy. A policy payable to a beneficiary is not part of the estate of the person who pays the premiums. *Jones* v. *Patty*, 18 So Rep. 794 (Miss.)

The decision is in accord with the weight of authority that the beneficiary named in a policy has a vested right with which the insured cannot interfere. *Pingrey* v. *Ins.* Co., 144 Mass. 374, I Harvard Law Review 156; *Garner* v. *Ins.* Co., 110 N. Y. 266, II Harvard Law Review 239; Bliss on Life Ins. S 318; Beach on Ins. S 602. But see 17 Western Jurist, 297. This seems the better view. It is difficult to say just what the nature of this is because of the confusion on the subject of the rights of beneficiaries in contracts. It is not a trust, since there is no *res* held in trust, and yet it has elements similar to a trust. There is a difficulty, however, when premiums are paid by a bankrupt. Even without a statute it would seem that a reasonable provision may be made for his family by a bankrupt. *Central Bank* v. *Hume*, 128 U. S 195, *McCutcheon's Appeal*, 99 Pa. St. 133 Cf. *Stokes* v. *Coffey* 8 Bush, 533.—*The Harvard Law Review.*

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Martgage—Defective Record of Instrument.—A mortgage left at the recorder's office is to be regarded as recorded from that time, in spite of the fact that it is actually recorded in the wrong book. *Farribee* v. *McKerrihan*, 33, Atl. Rep. 583 (Pa).

This may be regarded as the settled doctorine in Pennsylvania since the case of *Glading* v. *Frick*, 88 Pa. St. 460, which overruled *Luch's Appeal*, 44 Pa St. 519, going back to the case of *M'Lanahan* v. *Reeside*, 9 Watts, 511. The rule may seem harsh on a purchaser, but that the owner of land should suffer for the negligence of the recorder seems equally hard. Many instruments may be wrongly recorded in the

absence of negligence, as where they appear to be deeds, but are in fact mortages. Should they be held unrecorded until after some court has passed on their character, and so enabled them to be entered on the right book? What if the Court then reverses its decision? Must the owner wait till then before he can rely on the record? He has done all that is required of him when he deposits the deed in the hands of the recorder. That is all the statute demands of him." Of course, if it exacted not only a recording, but a recording in such and such a book, a different decision might be reached.—*The Harvard Law Review.*

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Property—Building High Fence—Malice.—A and B owned adjoining lots. A's house was built on the boundary line. B. on his own land erected a high fence so as to completely shut off the light and air from the windows of A's house. B acted purely from malicious motives. *Held,* A had no remedy at law or in equity. *Letts* v. *Kessler,* 42 N. E. Rep. 765 (Ohio).

The case is interesting as an extreme application of the rule that an act legal in itself does not become illegal because actuated by a malicious motive. This rule is sustained by the great weight of authority, especially in cases where the act is a malicious use of a property or contract right. *Stevenson* v. *Newnham,* 13 C. B., 285 (Eng.), *Chatfield* v. *Wilson,* 28 Vt. 49. *Chesley* v. *King,* 74 Me. 164, is *Contra,* but its authority is greatly diminished by the decision in the *Heywood* v. *Tillson,* 75 Me. 225 *Bartlett* v *O'Connor,* 36 Pac. Rep. 513 (Cal.), *Contra,* is ill considered and entitled to little weight.

The civil law, in cases of adjoining owners, allowed an action for the malicious use of property rights. D 39, 3, 1, 12 (Ulpain). The Scotch and German courts have followed the civil law, and are therefore opposed to the common law rules. In Massachusetts there is a statue giving a remedy in a case of malicious erection of fences St. 1887, c. 348. —*The Harvard Law Review.*

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Property—Dedication of Street.—The Plaintiff sued for a trespass by defendant company in laying gas pipes on a certain land of his. The defendant claimed that the land had been dedicated as a public street, and offered in evidence a deed by plaintiff conveying adjoining land and reserving the land in question as that piece "lying within the lines of Bates street as laid out upon the city plan." *Held* that such a plotting did not amount to an actual dedication, nor was the plaintiff estopped

to deny any public right of way over the land. *Patterson* v. People's *Natural Gas Co.*, 33 Atl. Rep. 575 (Pa).—*The Harvard Law Review.*

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Property—Water—Spring—Ownership.—Defendant came on plaintiff's land and carried away water from plaintiff's spring. *Held*, plaintiff had such property rights in the water as to entitle him to recover damages. *Metcalf* v. *Nelson*, 65, N. W. Rep. 911 (S. D.)

The point came up squarely, as the plaintiff sued for damages for the value of the water rather than to pursue his certain remedy of trespass. The few English authorities reach a contrary conclusion. They go on the ground that property in spring water is analogous to property in air and wild animals, and that little can be acquired only by occupancy; the owner of the realty having merely a usufructuary interest. The last English decision is that of *Race* v. *Ward*, 4 E. & B. 703 (1855). See also 2 Blackstone, 14, 18; *Year Book*, Trin. 15 Ed. IV. 29, case 7; *Manning* v. *Wasdale*, 5 A & E 758. The principal case seems to be the only one where the question has arisen in the United States. The conclusion is a desirable one, and the case would doubtless be followed. Perhaps it can be reconciled with the English decisions, as it assumes that the spring was found by percolating waters while the English cases assume that a spring is the outlet of an underground channel. Both the English and American Courts recognize a distinction between rights in percolating waters and those flowing in an underground channel. The authorities are collected in 64 Am. Dec. 727—730.—*The Harvard Law Review.*